Supreme Court, U.S.
FILED
NOV 10 2010
OFFICE OF THE CLERK

175

No. 10-349

IN THE

Supreme Court of the United States

SHELL OIL COMPANY; SWEPI, LP
(As Successor-in-Interest to
SHELL WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

---

BRIEF IN OPPOSITION

GUY A. FORTNEY
BREWSTER &
DEANGELIS, P.L.L.C.
2617 East 21st Street
Tulsa, OK 74114
(918) 742-2021

RANDALL K. CALVERT
Counsel of Record
CALVERT LAW FIRM
1041 NW Grand Boulevard
Oklahoma City, OK 73118
(405) 848-5000
rcalvert@calvertlaw.com

Counsel for Respondents Nancy Fuller Hebble, et al.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

This case involves an award of prejudgment interest on unlawfully withheld proceeds from the sale of oil and gas production using different statutory interest rates in effect at different times. Oklahoma courts have deemed such prejudgment interest compensatory as a matter of state law. *See, e.g., Fleet v. Sanguine, Ltd.*, 854 P.2d 892 (Okla. 1993). The statutory rates of prejudgment interest were historically reasonable.[1] The questions presented are:

1. Whether the prejudgment interest component of the jury's award of state-law compensatory damages of $13,205,916 should be deemed non-compensatory as a matter of federal constitutional law and thereby excluded from the ratio analysis under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

2. Whether this Court should abandon the multi-factor inquiry of *Gore*—applied by the lower courts in this case and across the country as settled law—by adopting a presumptive 1:1 ceiling on the constitutionally permissible ratio of punitive to compensatory damages.

---

[1] *See infra* note 1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
STATEMENT OF CASE	3
REASONS FOR DENYING THE PETITION	6
I. THE JURY'S AWARD OF PREJUDGMENT INTEREST TO COMPENSATE OWNERS FOR THE HARM INFLICTED BY SHELL DOES NOT PRESENT A SUBSTANTIVE DUE PROCESS ISSUE THAT WARRANTS THIS COURT'S REVIEW.	8
A. This Case Does Not Implicate Any Circuit Conflict	8
B. Shell's Constitutional Objection To The Consideration Of Prejudgment Interest In This Case Is Meritless	10
II. CERTIORARI IS UNWARRANTED TO RECONSIDER THE COURT'S CONSISTENT REFUSAL TO ADOPT RIGID MATHEMATICAL LIMITS ON PUNITIVE DAMAGES AWARDS	18
A. Shell Identifies No Certworthy Conflict Over Whether The Constitution Limits Punitive Damages Awards To An Amount Equal To Compensatory Damages.	19
B. There Is No Basis For This Court To Abandon Its Precedent And Establish An Arbitrary 1:1 Ratio	21
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Action Marine, Inc. v. Continental Carbon Inc., 481 F.3d 1302 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2994 (2008) 19

Amerigraphics, Inc. v. Mercury Cas. Co., 107 Cal. Rptr. 3d 307 (Cal. Ct. App. 2010) 9

Bach v. First Union Nat. Bank, 486 F.3d 150 (6th Cir. 2007) 20

Bardis v. Oates, 14 Cal. Rptr. 3d 89 (Cal. Ct. App. 2004) 9

Blount v. Stroud, 915 N.E.2d 925 (Ill. App. Ct. 2009), *cert. denied*, 79 U.S.L.W. 3007 (Nov. 1, 2010) 9

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005) 20

Boyd v. Goffoli, 608 S.E.2d 169 (W. Va. 2004) 9

Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470 (6th Cir. 2007) 8, 9, 20

Burns v. Prudential Sec., Inc., 857 N.E.2d 621 (Ohio Ct. App. 2006) 8

Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah 2004), *cert. denied*, 543 U.S. 874 (2004) 19

Casillas-Diaz v. Palau, 463 F.3d 77 (1st Cir. 2006) 21

Cent. Fla. Invs., Inc. v. Myers, No. 10-35, 2010 WL 3834443 (Oct. 4, 2010) 18

Chandler v. Bombardier Capital, Inc., 44 F.3d 80 (2d Cir. 1994) 15

TABLE OF AUTHORITIES—Continued

	Page
Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n, 895 F.2d 773 (D.C. Cir. 1990)	15
DiamlerChrysler Corp. v. Flax, No. 08-1010, 129 S. Ct. 2433 (2009)	18-19
E.E.O.C. v. Erie County, 751 F.2d 79 (2d Cir. 1984)	17
E.E.O.C. v. Guardian Pools, Inc., 828 F.2d 1507 (11th Cir. 1987)	17
Energen Resources Corp. v. Jolley, No. 08-1001, 129 S. Ct. 1633 (2009)	19
Fed. Sav. & Loan Ins. Corp. v. Quality Inns, Inc., 876 F.2d 353 (4th Cir. 1989)	16
Fleet v. Sanguine, Ltd., 854 P.2d 892 (Okla. 1993)	12
Fortis Ins. Co. v. Mitchell, No. 09-854, 130 S. Ct. 1896 (2010)	18
General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983)	11
Gibson v. Moskowitz, 523 F.3d 657 (6th Cir. 2008)	21
Goodall v. Trigg Drilling Co., Inc., 944 P.2d 292 (Okla. 1997)	3
Graden v. Conexant Sys., Inc., 496 F.3d 291 (3d Cir. 2007)	17
ITT Corp. v. United States, 17 Cl. Ct. 199 (Cl. Ct. 1989)	16
Jacobs v. United States, 290 U.S. 13 (1933)	11
JCB, Inc. v. Union Planters Bank, N.A., 539 F.3d 862 (8th Cir. 2008)	8
Jurinko v. Medical Protective Co., 305 Fed. Appx. 13 (3d Cir. 2008)	9

TABLE OF AUTHORITIES—Continued

	Page
Leck v. Continental Oil Co., 800 P.2d 224 (Okla. 1989)	3
Loeffler v. Frank, 486 U.S. 549 (1988)	11
Maxwell v. Samson Res. Co., 848 P.2d 1166 (Okla. 1993)	14
McClain v. Ricks Exploration Co., 894 P.2d 422 (Okla. Civ. App. 1994)	14
Mendez-Matos v. Municipality of Guaynabo, 557 F.3d 36 (1st Cir. 2009)	20
Miller v. Robertson, 266 U.S. 243 (1924)	12
Modern Mgmt. Co. v. Wilson, 997 A.2d 37 (D.C. 2010)	9
Okland Oil Co. v. Conoco, Inc., 144 F.3d 1308 (10th Cir. 1998)	13, 14
Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	21-22
Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617 (7th Cir. 2000), *cert. denied*, 531 U.S. 1153 (2001)	9
Peters v. Rivers Edge Mining, Inc., 680 S.E.2d 791 (W. Va. 2009)	8
Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists, 422 F.3d 949 (9th Cir. 2005), cert. denied, 547 U.S. 1111 (2006)	19
Quigley v. Winter, 598 F.3d 938 (1st Cir. 2010)	21
Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 345 F.3d 1366 (Fed. Cir. 2003), cert. denied, 540 U.S. 1183 (2004)	19
Roby v. McKesson Corp., 219 P.3d 749 (Cal. 2009)	9

TABLE OF AUTHORITIES—Continued

	Page
Romanski v. Detroit Entm't, L.L.C., 428 F.3d 629 (6th Cir. 2005), *cert. denied*, 549 U.S. 946 (2006)	19
Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793 (8th Cir. 2004), *cert. denied*, 544 U.S. 1027 (2005)	19
State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003)	18, 19, 21, 22
State of Kan. v. State of Colo., No. 105, Original, 2000 WL 34508307 (U.S. Aug. 31, 2000)	15
Stroud v. Blount, No. 09-1572, 79 U.S.L.W. 3007 (Nov. 1, 2010)	2, 9-10
Superior Highwall Miners, Inc. v. Frye, No. 09-1017, 130 S. Ct. 2354 (2010)	18
Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 2006)	9
Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co., 661 N.W.2d 789 (Wis. 2003), *cert. denied*, 540 U.S. 1074 (2003)	19
Union Pacific R.R. Co. v. Barber, 149 S.W.3d 325 (Ark. 2004), *cert. denied*, 543 U.S. 940 (2004)	19
United Int'l Holdings, Inc. v. Wharf (Holdings), Ltd., 210 F.3d 1207 (10th Cir. 2000)	8
Waite v. United States, 282 U.S. 508 (1931)	11
West Virginia v. United States, 479 U.S. 305 (1987)	11
Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004)	20

TABLE OF AUTHORITIES—Continued

Page

Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224 (3d Cir. 2005) 9
Young v. West Edmond Hunton Lime Unit, 275 P.2d 304 (Okla. 1954) 3
Zhang v. American Gem Seafood's, Inc., 339 F.3d 1020 (9th Cir. 2003), *cert. denied*, 541 U.S. 902 (2004) 19

STATUTES

OKLA. STAT. tit. 12, §§ 727-727.1 1
OKLA. STAT. tit. 23, § 9.1 13
OKLA. STAT. tit. 52, § 540 5
OKLA. STAT. tit. 52, § 540B (West 1981) 12
OKLA. STAT. tit. 52, § 540D (West 1991) 12
OKLA. STAT. tit. 52, § 570.10 (formerly § 540) 1
OKLA. STAT. tit. 52, § 570.10D 15
Production Revenue Standards Act, OKLA. STAT. tit. 52, §§ 570.1-570.15 12

MISCELLANEOUS

1995-1 C.B. 560 (Table 5) 5
Bureau of Labor Statistics, CPI Databases (All Urban Consumers) http://www.bls.gov/cpi 15
Federal Reserve Statistical Release (Data Download Program) http://www.federalreserve.gov/datadownload/Choose.aspx?rel=H.15 5
RESTATEMENT (SECOND) OF TRUSTS § 207 (1959) 16
SEC EDGAR System, http://www.sec.gov/edgar/searchedgar/webusers.htm 15

IN THE

Supreme Court of the United States

No. 10-349

SHELL OIL COMPANY; SWEPI, LP
(As Successor-in-Interest to
SHELL WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

This case involves a unique series of state statutes that set prejudgment interest rates for unlawfully withheld oil and gas proceeds at historically reasonable rates of return,[1] and a punitive-to-compensatory

[1] The court properly instructed the jury to use the interest rate in effect at each time period (*i.e.*, 6% simple prior to 1980, 12% simple from 1980 to 1989, and 12% compound after 1989). OKLA. STAT. tit. 52, § 570.10 (formerly § 540). Shell ignores that from 1986 to 2008 the Oklahoma judgment interest averaged more than 9%. OKLA. STAT. tit. 12, §§ 727-727.1.

damages ratio of approximately 4:1 that the state trial and appellate courts upheld only after applying the settled guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Through its first question presented, Shell seeks to federalize state law definitions of compensatory damages by asking this Court to comprehensively and definitively distinguish the compensatory from the punitive for due-process purposes in a dizzying variety of contexts, from attorney fees, to treble damage awards, to disgorged profits, to damages for mental anguish, to—finally—the prejudgment interest at issue in this particular case. Pet. at 22-24. However, Shell never offered any general—much less workable—standard below, nor does it do so here.

Through its second question presented, Shell invites this Court at worst to reduce *Gore*'s case-sensitive multi-factor inquiry to a mechanical 1:1 ratio, or at best to engage in fact-bound error-correction of the lower courts' unremarkable application of *Gore* and its progeny. Neither question implicates a clear split in authority. The latter question runs contrary to this Court's approach in punitive damages cases. *See, e.g.*, *Gore*, 517 U.S. at 582 (noting that this Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"). The petition should be denied. *Cf. Stroud v. Blount*, No. 09-1572, 79 U.S.L.W. 3007, 3019 (Nov. 1, 2010) (denying certiorari on the question of whether an award of attorney fees constitutes compensatory damages for due-process purposes).

STATEMENT OF CASE

Respondents, Nancy Fuller Hebble, *et al.* ("Owners") were individuals residing in Texas, California, and North Carolina.[2] The Owners own one-fourth of an oil and gas lease in Oklahoma ("the Crews Lease"). Pet. App. 2a. The Petitioners ("Shell") operated three units producing oil and gas from the Crews Lease until 1985. *Id.* at 2a-4a. As the operator of the units, Shell sold the oil and gas and received the proceeds therefrom in trust to distribute to Owners. Under Oklahoma law, Shell had a fiduciary duty to correctly administer and distribute Owners' oil and gas proceeds. *Id.* at 6a-7a.[3]

From 1973 to 1985, Shell kept substantially all of Owners' oil and gas proceeds. Plaintiffs' Tr. Exh. P250. Shell sent monthly statements to Owners for twelve years that fraudulently showed that Owners had earned very little from the Crews Lease, thus concealing $14 million of oil and gas production. Tr. 56. Shell also sent various letters that concealed the misappropriation and contained affirmative statements that were false. *See, e.g.*, Plaintiffs' Tr. Exhs. P36, P45, P57, P59, and P74. Shell misappropriated Owners' share of the unreported oil and gas production that had been entrusted to it. Pet. App. 4a.

At the same time Shell was writing to Owners to conceal its fraud, Shell was communicating with a successor operator of the Crews Lease that continued

---

[2] The Owners owned their interests individually or were beneficiaries of trusts that owned the interests.

[3] *See also Goodall v. Trigg Drilling Co., Inc.*, 944 P.2d 292, 295-96 (Okla. 1997) (Summers, J., concurring); *Leck v. Continental Oil Co.*, 800 P.2d 224, 228-29 (Okla. 1989); *Young v. West Edmond Hunton Lime Unit*, 275 P.2d 304, 309-10 (Okla. 1954).

Shell's pattern of misappropriating Owners' oil and gas proceeds. Plaintiffs' Tr. Exh. P70, P73, P136, and P137. The successor operator, Maynard Oil Company, continued the misappropriation of Owners' oil and gas proceeds for ten years. Pet. App. 4a. In 1993, Nick McGalliard, an independent petroleum land manager, discovered Maynard's and Shell's fraudulent conduct during a conversation with a Maynard land manager. McGalliard informed Owners about Shell's fraudulent conduct. Tr. 433, 440, 443-48.

In 1995, Owners brought suit in Stephens County, Oklahoma, against Maynard and Shell for breach of fiduciary duty and fraud. Pet. App. 4a. Owners settled with Maynard, and the case proceeded against Shell. *Id.* The case was tried to a jury in May 2008. Shell stipulated to the value of the oil and gas proceeds in its possession that belonged to Owners. Plaintiffs' Tr. Exh. P253. The court found that Shell had a fiduciary duty to faithfully report and distribute the proceeds. Pet. App. 2a. The jury found that Shell violated its fiduciary duty to Owners by taking Owners' oil and gas proceeds and concealing that fact over a twenty-year period. The jury also found that Shell's conduct constituted fraud. *Id.* at 5a.

At trial, Shell admitted most of the critical facts sufficient to establish Owners' claims for fraud and breach of fiduciary duty, stipulating, among other things, to the amount of oil and gas proceeds it had taken. Plaintiffs' Tr. Exh. P253. Shell argued instead that it should retain the proceeds of its unlawful conduct because, in its view, Owners knew or should have known of Shell's fraud years earlier. Pet. at 4a-5a. The jury unanimously rejected Shell's limitations defense and entered judgment in Owners'

favor. *Id.* at 5a. The jury awarded compensatory damages in the amount of $13,205,916. *Id.*

The compensatory award presumably was based upon Owners' expert witness's damages calculation, which used the statutory interest rates in effect at the various dates: 6% simple interest from 1973 through July 1, 1980, then 12% simple interest through July 1, 1989, and 12% compound interest after July 1, 1989. *Id.* at 12a-13a and Plaintiffs' Tr. Exh. P250. These rates compare favorably to the interest-rate environment over the thirty-five-year period. Prior to 1989, damages were calculated using simple interest, while market interest rates ranged from 8% to 19% compound.[4] In 1980, when Oklahoma enacted a 12% simple interest rate for unpaid oil and gas proceeds,[5] the prime rate was over 15%,[6] mortgage rates were over 13%,[7] and the "IRS rate" was 12%.[8] The effective compound rate of interest over the entire period of the compensatory damage calculation was 9.9%. The interest rates used to calculate the compensatory damage award did not operate as a penalty; they were fair rates that compensated for the time value of money.

In bifurcated proceedings, the trial court independently found clear and convincing evidence that Shell's conduct constituted fraud, non-disclosure, concealment, and deceit. Pet. App. 14a-15a, and 27a-30a. Accordingly, it returned the case to the jury

---

[4] Federal Reserve Statistical Release (Data Download Program) http://www.federalreserve.gov/datadownload/Choose.aspx?rel=H.15.

[5] OKLA. Stat. tit. 52, § 540.

[6] *Supra*, note 5

[7] *Id.*

[8] 1995-1 C.B. 560 (Table 5).

to determine the appropriate amount of punitive damages to award, if any. *Id.* at 29a. The factors the jury was instructed to consider included: (1) degree of wrongfulness of the misconduct; (2) how long the misconduct lasted; (3) evidence of similar misconduct; (4) attempts to conceal the misconduct; (5) benefit from the misconduct; and (6) need to discourage others from similar misconduct. Jury Instruction 1, Second Stage. Shell did not ask the court to instruct the jury that its punitive damages award should take into account any allegedly punitive aspect of the interest already awarded. Nor did Shell ask the court to instruct the jury to award punitive damages in any particular ratio to compensatory damages. The jury returned a punitive damages award in the amount of $53,625,000, constituting a ratio of approximately 4:1. Pet. App. 2a.

The Oklahoma Court of Civil Appeals found that the reprehensibility of Shell's conduct was heightened because Shell was in a position of trust and authority when the fraud was perpetrated. Pet. App. 15a. The court found that the compensatory damages were reasonable compensation for the harm suffered by Owners and that the punitive damages award was not grossly excessive. *Id.* at 13a-16a. The Oklahoma Supreme Court denied Shell's petition for certiorari. *Id.* at 32a.

REASONS FOR DENYING THE PETITION

Neither question presented warrants this Court's review. The first question invites this Court to reject, as a federal constitutional matter, a settled state law determination that statutory prejudgment interest for unlawfully withheld oil and gas proceeds is a component of compensatory damages. But there is no

clear split in this particular context, as no federal court or state court of last resort has held that prejudgment interest of any sort—much less the kind here that compensates for the time-value of money at historically reasonable rates—cannot be considered compensatory under *Gore*. Nor are lower courts in conflict more broadly over how to distinguish the compensatory from the punitive for due-process purposes, regardless of whether the context is attorney fees, treble damage awards, disgorged profits, damages for mental anguish, or prejudgment interest. Pet. at 22-24. Lower courts properly have confined their due process analysis to case-specific application of the guideposts set forth in *Gore* rather than engaging in "wide-ranging" federal lawmaking that categorically displaces state lines between compensatory and punitive damages. Pet. at 16. This Court too should avoid that anchorless endeavor.

The second question calls on this Court either to reduce the case-specific, multi-factored *Gore* inquiry to a one-size-fits-all ratio of 1:1, a mathematical approach which this Court and the lower courts have consistently rejected, or to engage in fact-bound error correction of a 4:1 ratio, which both the trial and appellate courts found to be supported by clear and convincing evidence of fraud, non-disclosure, concealment, and deceit by Shell over the course of decades. This question also is not certworthy.

I. THE JURY'S AWARD OF PREJUDGMENT INTEREST TO COMPENSATE OWNERS FOR THE HARM INFLICTED BY SHELL DOES NOT PRESENT A SUBSTANTIVE DUE PROCESS ISSUE THAT WARRANTS THIS COURT'S REVIEW.

A. This Case Does Not Implicate Any Circuit Conflict.

Shell alleges "a wide-ranging conflict" across the lower courts on what kinds of awards should be considered as part of the *Gore* ratio. Pet. at 16. But the cases Shell cites demonstrate that there is no conflict on the issue of prejudgment interest, and no basis for this Court to grant certiorari in this case to resolve alleged conflicts regarding other kinds of awards.

1. *Prejudgment Interest.* Shell recognizes that an interest award representing a rational estimation of the time value of money is compensatory. *See* Pet. at 24. Shell then contradicts itself by asserting that "ordinary prejudgment interest" should not be treated as compensatory under *Gore*, citing decisions from three federal circuits, one state court of last resort, and one intermediate appellate state court. Pet. at 23. Unsurprisingly, the cases Shell cites do not state that prejudgment interest is not compensatory. Instead, each simply ignores prejudgment interest in analyzing the *Gore* ratio. *See, e.g.*, *JCB, Inc. v. Union Planters Bank, N.A.*, 539 F.3d 862, 876 (8th Cir. 2008); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 488-89 (6th Cir. 2007); *United Int'l Holdings, Inc. v. Wharf (Holdings), Ltd.*, 210 F.3d 1207, 1232-34 (10th Cir. 2000); *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 649-54 (Ohio Ct. App. 2006); *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 803 & n.10, 823-26 (W. Va. 2009).

Shell thus has not identified any decision from any circuit or state supreme court[9] addressing the question it presents here, much less any decision resolving that question in conflict with the decision in this case.

2. *Other Types of Awards.* The other cases invoked by Shell all involve legal questions that are not present in this case. Shell cites cases involving: (1) attorney fees;[10] (2) disgorged profits;[11] (3) statutory treble damages awards;[12] and (4) damages for mental anguish.[13] This Court recently denied certiorari to resolve the alleged conflict regarding attorney fees. *Stroud v. Blount*, No. 09-1572, 79 U.S.L.W. 3007,

---

[9] Shell cites one case from a state intermediate appellate court in which the court held that prejudgment interest is not compensatory damages includable in the ratio. *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Cal. Ct. App. 2010). Significantly, the authority cited in *Amerigraphics*, *Bardis v. Oates*, 14 Cal. Rptr. 3d 89 (Cal. Ct. App. 2004), holds that prejudgment interest *should be included* on the compensatory side of the *Gore/State Farm* ratio. *See id.* at 100-01. In any event, unless and until the California Supreme Court adopts the rule of *Amerigraphics* as its own, the error or conflict within a state judicial system does not warrant this Court's intervention.

[10] *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 233-37 (3d Cir. 2005); *Jurinko v. Medical Protective Co.*, 305 Fed. Appx. 13, 27 n.16 (3d Cir. 2008); *Amerigraphics*, 107 Cal. Rptr. 3d at 329; *Blount v. Stroud*, 915 N.E.2d 925 (Ill. App. Ct. 2009), *cert. denied*, 79 U.S.L.W. 3007, 3019 (Nov. 1, 2010).

[11] *See Bridgeport Music*, 507 F.3d at 489.

[12] *See Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 57 (D.C. 2010); *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 621-23 (7th Cir. 2000), *cert. denied*, 531 U.S. 1153 (2001).

[13] *Boyd v. Goffoli*, 608 S.E.2d 169, 182-84 (W. Va. 2004); *Roby v. McKesson Corp.*, 219 P.3d 749, 797-98 (Cal. 2009); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308-10 (Tex. 2006).

3019 (Nov. 1, 2010). These cases do not set forth any general approach to distinguish between compensatory and punitive damages that would put them at odds with each other, this Court, or this case. Nor would deciding this case shed any significant light on the proper treatment of attorney fees, treble damages, disgorgement, or damages for mental anguish. Indeed, as discussed below, Shell's proposed constitutional rule—allowing courts to consider, as part of compensatory damages, awards that represent "a historically accepted and currently reasonable estimate of the 'concrete loss that the plaintiff suffered by reason of the defendant's wrongful conduct,'" Pet. at 24 (citation omitted)—does not provide any additional guidance in this case, much less dictate the proper treatment of, for example, attorney fees or damages for mental anguish.[14]

B. Shell's Constitutional Objection To The Consideration Of Prejudgment Interest In This Case Is Meritless.

Shell is also wrong in insisting that review is warranted here because the Oklahoma courts contra-

---

[14] Shell also alleges that, in deciding cases about attorney fees, disgorgement, treble damages, and damages for mental anguish, courts have given different weight to how state legislatures have characterized the function of a particular kind of award. *See* Pet. at 16-18. None of the cases Shell cites involve awards of prejudgment interest. Nor, contrary to Shell's suggestion, Pet. at 15, did the decision in this case establish any legal principle in Oklahoma that statutory labels are conclusive for purposes of resolving a federal due process challenge to a punitive damages award. *Compare* Pet. App. 13a (adverting to statutory label in rejecting Shell's *state law* claim that punitive damages award was duplicative of allegedly punitive interest award) *with* Pet. App. 15a-16a (resolving constitutional claim without any reference to labels).

vened this Court's decisions by mischaracterizing the interest award in this case as compensatory damages for purposes of the *Gore* ratio analysis. That argument fails at its premise – Shell's characterization of the jury's award of prejudgment interest as a "heightened penalty," *see* Pet. at 21 (citation omitted), finds no support in the decisions of this Court, the Oklahoma statute, state and federal decisions interpreting that statute, or general principles governing prejudgment interest.

This Court has repeatedly explained that prejudgment interest "is an element of [plaintiff's] complete compensation." *West Virginia v. United States*, 479 U.S. 305, 310 (1987); *see also id.* at 310 n.2 ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress."); *Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (stating that "[p]rejudgment interest, of course, is 'an element of complete compensation'") (*quoting West Virginia v. United States*, 479 U.S. at 310); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 n.10 (1983) (explaining in a patent case that "[a] rule denying prejudgment interest not only undercompensates the patent owner but may also grant a windfall to the infringer and create an incentive to prolong litigation" and that "[t]here is no reason why an infringer should stand in a better position than a party who agrees to pay a royalty and then fails to pay because of financial difficulties"); *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933) (holding that interest from time of the taking is necessary to constitute adequate compensation under the Fifth Amendment); *Waite v. United States*, 282 U.S. 508, 509 (1931) (Holmes, J.) (holding that

interest should be allowed in order to make compensation "entire"); *Miller v. Robertson*, 266 U.S. 243, 258 (1924) (holding that prejudgment interest may be awarded "to arrive at fair compensation").

Shell has not shown that some special feature of the prejudgment interest statute specific to this case so departs from ordinary legislative attempts to compensate victims for the time value of their lost money that it must be treated as punitive for purposes of the *Gore* analysis.

In 1980, Oklahoma enacted OKLA. STAT. tit. 52, § 540B (West 1981) in order to establish guidelines for reporting oil and gas production and to require prompt distribution of oil and gas proceeds. The statute required operators to pay twelve percent (12%) per annum simple interest on oil and gas proceeds that were improperly withheld. In 1989, the statute was amended to provide interest at the rate of twelve percent (12%) per annum to be compounded annually. OKLA. STAT. tit. 52, § 540D (West 1991).[15] This interest is "an element of the . . . legal damage for the operator's default in payment." *Fleet v. Sanguine, Ltd.*, 854 P.2d 892, 900 (Okla. 1993). In 1980, when § 540 was enacted, the prime rate was over 15%, mortgage rates were over 13%, and the "IRS rate" was 12%.[16] The 12% interest rate did not operate as a penalty; it was a fair rate to compensate for the time value of money.

Shell nonetheless insists that "there can be no claim that 12% interest compensates for [Owners']

---

[15] OKLA. STAT. tit. 52, § 540 was recodified in 1991 as part of the Production Revenue Standards Act, OKLA STAT. tit. 52, §§ 570.1-570.15 ("PRSA").

[16] *See supra* notes 5, 7, 8, and 9.

harm or represents the lost time-value of money," Pet. at 19, for several reasons, none of which has any merit.

First, Shell points out that the legislature at one point labeled the rate a "penalty." *Id.* But Shell itself insists that due process analysis cannot depend on "the label the State chooses to attach" to the interest award. *Id.* at 20. The Constitution is concerned with substance, not labels.

Second, Shell cites a decision from the Oklahoma Supreme Court characterizing the rate as intended to "compel compliance" in addition to provide "compensation." *Id.* at 19. But the fact that a rate provides an incentive to properly distribute trust funds does not, in itself, render an interest rate punitive – it simply reflects that any rate that does not at least provide full compensation for the time value of money gives wrongdoers a financial incentive to delay payment.

In fact, the purposes and application of PRSA interest are completely different from the purpose and application of punitive damages. Punitive damages may be awarded under OKLA. STAT. tit. 23, § 9.1 only if the jury finds by clear and convincing evidence that the defendant has acted with reckless disregard for the rights of others or has acted intentionally and with malice toward others. *See id.* § 9.1 B, C. In contrast, PRSA interest is awarded to a plaintiff without a showing of recklessness, intent, or malice. *Okland Oil Co. v. Conoco, Inc.*, 144 F.3d 1308, 1320 (10th Cir. 1998).

Thus, the PRSA's 12% prejudgment interest serves to compel compliance with the statute's requirement for prompt distribution of oil and gas proceeds. *See*

McClain v. Ricks Exploration Co., 894 P.2d 422, 431-32 (Okla. Civ. App. 1994). Punitive damages, on the other hand, are intended to provide "'a punishment for the benefit of society as a restraint upon the transgressor, and a warning and example serving as a deterrent to commission of like offenses in the future.'" *Maxwell v. Samson Res. Co.*, 848 P.2d 1166, 1172 (Okla. 1993) (*quoting Oller v. Hicks*, 441 P.2d 356, 360 (Okla. 1967)). There is no overlapping purpose between the award of PRSA compensatory interest and punitive damages awards such that they are duplicative.

Accordingly, in a case not cited by Shell, the Tenth Circuit determined Oklahoma PRSA interest is compensatory. *Okland Oil*, 144 F.3d at 1317. The Tenth Circuit concluded that "the jury may award prejudgment interest on top of the principal amount *in order to compensate for the detriment caused by the deprivation of the money*." *Id.* (emphasis added).

Third, in the end, Shell relies principally on the fact that another Oklahoma statute provides a lower rate for different kinds of cases. Pet. at 19. But, again, Shell itself recognizes that the Constitution cannot possibly impose different caps on punitive damages depending on the accident of what other rates each state provides for different kinds of claims. *Id.* at 20-21.

Nor can Shell seriously claim that 6% simple interest constitutes the maximum constitutionally allowable measure of the time value of Owners' money.[17]

---

[17] In footnote 4, Pet. at 19, Shell incorrectly states that under the PRSA defendants who justifiably withhold payment based on a legitimate dispute over title pay only six percent *simple* interest rather than twelve percent compound interest. In fact,

After 35 years of inflation, the dollar that Shell took in 1974 was worth only 22 cents in 2008.[18] Using only simple interest (not compound interest), it would have require 10.3% interest just to keep pace with the rate of inflation (inflation is compound) from 1974 to 2007.[19] An interest rate barely above inflation "simply ensures that inflation does not erode the value of money;" it does nothing "to compensate for the lost use of the money in the intervening time."[20] As Shell's own financial experience demonstrates, Owners would have earned greater returns had the money been distributed to them on time when the oil and gas was produced.[21]

---

the PRSA provides: "Where such proceeds are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of six percent (6%) per annum to be *compounded annually*." OKLA. STAT. tit. 52, 570.10D (emphasis added).

[18] Bureau of Labor Statistics, CPI Databases (All Urban Consumers) http://www.bls.gov/cpi.

[19] Simple interest is calculated on the original principal amount, therefore the same amount of interest is earned every year on the principal. The rate of simple interest required just to compensate for inflation is calculated as follows: the CPI index (1967=100) for January 1974 is 139.7, the index for December 2007 is 629.17; adjusted for inflation, a 1974 dollar is worth $4.50 (629.17/139.7); the $3.50 difference equals .103 per year ($3.50 / 34 = .103), or 10.3% per annum.

[20] *State of Kan. v. State of Colo.*, No. 105, Original, 2000 WL 34508307, at *37 (U.S. Aug. 31, 2000) (quoting *United States v. City of Warren, Mich.*, 138 F.3d 1083, 1096 (6th Cir. 1998)); *see also Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir. 1994) (same); *Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 780 (D.C. Cir. 1990) (same).

[21] *See* Shell Oil Company annual reports, SEC EDGAR System, http://www.sec.gov/edgar/searchedgar/webusers.htm; *see also* Plaintiffs' Tr. Exh. P240.32.

Shell attacks the use of compound interest without any attempt to relate its argument to the harm suffered by Owners. It cites two 19th century treatises for the proposition that compound interest is punitive. *See* Pet. at 20 n.5. But compound interest is the reality of today's financial markets – even a child's savings account earns compound interest.[22] It is settled law that fiduciaries like Shell are responsible for compound interest on funds improperly withheld from their beneficiaries when the fiduciary has earned profits in excess of the interest amount. RESTATEMENT (SECOND) OF TRUSTS § 207 (1959).[23]

Accordingly, the State's 6% simple interest rate is plainly less than what is necessary to provide victims complete compensation for their financial injuries.[24] That a defendant might receive a windfall with respect to interest in some cases says nothing about what the Constitution permits or prohibits with respect to punitive damages in this one.

Fourth, setting aside its plainly meritless reliance on the 6% simple interest provision, Shell has produced no evidence below, or in its petition here, establishing what constitutes the maximum rational measure of the time value of money. It apparently

---

[22] "The court is prepared to take judicial notice that compound interest is a market or commercial reality for any corporation that does business in the United States." *ITT Corp. v. United States*, 17 Cl. Ct. 199, 242 (Cl. Ct. 1989).

[23] *See Fed. Sav. & Loan Ins. Corp. v. Quality Inns, Inc.*, 876 F.2d 353, 359 (4th Cir. 1989) (following the Restatement and holding that defendant "is liable as a trustee for compound prejudgment interest").

[24] Shell thus earned much more from the use of Owners' funds than the jury's verdict for compensatory damages. *See* note 22, *supra*.

expects this Court to intuit this figure from the Constitution itself, resolving a contentious matter of perennial debate among economists by judicial notice (or, more aptly, judicial fiat). And because the figure undoubtedly varies from state to state, and over time, Shell must expect that lower courts (supervised by this Court) will develop and maintain a constitutional interest matrix, something of a judicial version of the Consumer Price Index.

Even if courts were suited for such a task—which they obviously are not—it would make no difference here, because the Oklahoma legislature could rationally conclude that the 12% interest rate represents a reasonable compensatory measure. That interest rate falls within the range of rates used throughout the law for that purpose. For example, courts use the prime interest rate,[25] return on a prudent investment account,[26] and the IRS rate.[27]

Shell's claim thus fails even under its own proposed constitutional standard. Having asserted a

---

[25] *See, e.g.*, *E.E.O.C. v. Erie County*, 751 F.2d 79, 82 (2d Cir. 1984) ("Since the goal of a suit under the FLSA and Equal Pay Act is to make whole the victims of the unlawful underpayment of wages, and since the adjusted prime rate has been adopted as a good indicator of the value of the use of money, it was well within the discretion of the district court to order that the rate of prejudgment interest to be paid by the defendants on the backpay awards be the adjusted prime rate.").

[26] *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 301 (3d Cir. 2007) (holding in an ERISA case that "the measure of damages is the amount that affected accounts would have earned if prudently invested").

[27] *E.E.O.C. v. Guardian Pools, Inc.*, 828 F.2d 1507, 1512 (11th Cir. 1987) ("direct[ing] the district court to calculate an award of [prejudgment] interest based upon the IRS prime rates").

novel constitutional claim, Shell was required at the very least to come forward with evidence that the prejudgment interest award in this case exceeded the "historically accepted and currently reasonable estimate of" the injury inflicted upon Owners by virtue of the loss of the use of their money over the decades. Pet. at 24. It has not done so. If the Court is to identify a constitutional limit on cognizable prejudgment interest, it should await a case with a properly developed record and the likelihood that the Court's constitutional decision would make a difference to the outcome.

II. CERTIORARI IS UNWARRANTED TO RECONSIDER THE COURT'S CONSISTENT REFUSAL TO ADOPT RIGID MATHEMATICAL LIMITS ON PUNITIVE DAMAGES AWARDS.

Shell asks this Court to ignore the *Gore* multifactor analysis and establish a presumptive cap on punitive damages equal to the amount of any compensatory damages award in a case. Pet. at i. This Court has "consistently rejected invitations to invent a constitutional line marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *Gore*, 517 U.S. at 582 (emphasis in original); *see also State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). And it has consistently denied petitions asking the Court to reconsider that position. *See, e.g.*, *Cent. Fla. Invs., Inc. v. Myers*, No. 10-35, 2010 WL 3834443 (Oct. 4, 2010); *Superior Highwall Miners, Inc. v. Frye*, No. 09-1017, 130 S. Ct. 2354 (2010); *Fortis Ins. Co. v. Mitchell*, No. 09-854, 130 S. Ct. 1896 (2010); *DiamlerChrysler Corp. v. Flax*, No.

08-1010, 129 S. Ct. 2433 (2009); *Energen Resources Corp. v. Jolley*, No. 08-1001, 129 S. Ct. 1633 (2009).[28] Shell provides no basis for a different result here.

A. Shell Identifies No Certworthy Conflict Over Whether The Constitution Limits Punitive Damages Awards To An Amount Equal To Compensatory Damages.

Shell alleges that the courts are "squarely divided," Pet. at 27, over the application of this Court's statement in *State Farm* that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps

---

[28] The Court has likewise consistently denied certiorari in other cases, including some cited by Shell, raising excessiveness challenges. *See, e.g., Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321-22 (11th Cir. 2007) (affirming a 5:1 ratio), *cert. denied*, 128 S. Ct. 2994 (2008); *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 645-50 (6th Cir. 2005) (reducing to a ratio of 2,150:1), *cert. denied*, 549 U.S. 946 (2006); *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 963 (9th Cir. 2005) (reducing to a ratio of 9:1), *cert. denied*, 547 U.S. 1111 (2006); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798, 802-03 (8th Cir. 2004) (reinstating a ratio of 224:1), *cert. denied*, 544 U.S. 1027 (2005); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003) (affirming a ratio of over 3:1), *cert. denied*, 540 U.S. 1183 (2004); *Zhang v. American Gem Seafood's, Inc.*, 339 F.3d 1020, 1044-45 (9th Cir. 2003) (affirming a ratio of slightly more than 7:1), *cert. denied*, 541 U.S. 902 (2004); *Union Pacific R.R. Co. v. Barber*, 149 S.W.3d 325, 347-50 (Ark.) (affirming a ratio of approximately 5:1), *cert. denied*, 543 U.S. 940 (2004); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 417-18 (Utah) (affirming a ratio of 9:1), *cert. denied*, 543 U.S. 874 (2004); *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803-04 (Wis.) (affirming a ratio of 7:1), *cert. denied*, 540 U.S. 1074 (2003).

only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. In particular, Shell alleges that the decision in this case conflicts with the law of the First, Sixth, and Eighth Circuits which, Shell claims, enforce a "1-to-1 benchmark as the presumptive constitutional norm where compensatory damages are substantial." Pet. at 27.[29]

But each of the cases Shell cites applies the three *Gore* guideposts for assessing punitive damage awards: "the reprehensibility of defendants' conduct, the disparity between plaintiffs' harm and the award, and a comparison of the award and civil penalties in comparable cases." *Bridgeport Music*, 507 F.3d at 486; *see also Bach*, 486 F.3d at 153 (applying the three guideposts); *Mendez-Matos*, 557 F.3d at 52 (same); *Williams*, 378 F.3d at 796-99 (same); *Boerner*, 394 F.3d at 602 (same). None purports to establish the constitutional rule Shell asks the Court to apply here. For example, the Sixth Circuit panel in *Bach* noted, "*[W]e would be wary of any attempt to graft our ruling here onto another set of facts. Ascertaining the constitutionally correct amount of punitive damages in a given case is a highly fact-intensive exercise, and the facts before us drive our conclusion in this case.*" 486 F.3d at 156 (emphasis added).

Indeed, it requires little effort to find cases from the same circuits Shell cites upholding punitive damages awards above the alleged 1:1 "presumptive

---

[29] Pet. at 27-28 (citing *Bridgeport Music*, 507 F.3d 470; *Bach v. First Union Nat. Bank*, 486 F.3d 150 (6th Cir. 2007); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36 (1st Cir. 2009); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004); and *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005)).

constitutional norm." Pet. at 27; *see Quigley v. Winter*, 598 F.3d 938, 954 (1st Cir. 2010) (concluding that a ratio of 4:1 was appropriate); *Gibson v. Moskowitz*, 523 F.3d 657, 664-65 (6th Cir. 2008) (upholding a ratio of 2:0); *Casillas-Diaz v. Palau*, 463 F.3d 77, 85-86 (1st Cir. 2006) (upholding a ratio of 3.33:1).

Far from creating a "presumptive constitutional norm," Pet. at 27, these cases simply reflect a case-specific application of *Gore* and *State Farm*. In every circuit and state, cases can be found carefully applying the fact-intensive complexity of the *Gore* guideposts and the *State Farm* considerations for reprehensibility with a variety of results, all within the framework provided for constitutionally acceptable punitive damage awards. The efforts of these courts do not represent conflict but thoughtful consideration post-*State Farm*.

B. There Is No Basis For This Court To Abandon Its Precedent And Establish An Arbitrary 1:1 Ratio.

From the inception of this Court's recognition of a substantive due process limitation on the size of punitive damages awards, the Court has instructed lower courts to consider the particular facts at hand, with reference to general guideposts, including the degree of reprehensibility of the conduct at issue, the disparity between the harm or potential harm suffered by a plaintiff and the punitive damages award, and the difference between the award and the civil penalties authorized. *Gore*, 517 U.S. at 575. Thus, the Court has repeatedly held that it "need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Pac. Mut. Life Ins.*

Co. v. Haslip, 499 U.S. 1, 18 (1991); *see also Gore*, 517 U.S. at 582 (same) (quoting *Haslip*).[30]

Shell makes no pretense that any constitutional text or historic tradition would justify creation of a new constitutional right against punitive damages exceeding the amount of a compensatory award. Indeed, any such principle would call into question the constitutionality of the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish," *State Farm*, 538 U.S. at 425, the very tradition this Court relied upon to justify consideration of ratios in the first place. *See Gore*, 517 U.S. at 580-81.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

GUY A. FORTNEY
BREWSTER & DEANGELIS, P.L.L.C.
2617 East 21st Street
Tulsa, OK 74114
(918) 742-2021

RANDALL K. CALVERT
Counsel of Record
CALVERT LAW FIRM
1041 NW Grand Boulevard
Oklahoma City, OK 73118
(405) 848-5000
rcalvert@calvertlaw.com

Counsel for Respondents Nancy Fuller Hebble, et al.

---

[30] If the Court were to grant certiorari in this case, it should affirm the decision below on the alternative ground that Shell's challenge is premised on precedent (*Gore* and *State Farm*) that should now be overruled in order to return the regulation of the size of punitive damages awards to the rightful control of the states and Congress.